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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1423

JOSEPH VICTOR CUSUMANO and
SIDNEY M. HARMON,
Petitioners,

vs.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph Victor Cusumano and Sidney M. Harmon respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on December 17, 1974.

OPINIONS OF THE COURTS BELOW

The Judgments and Memorandum Opinions of the United States District Court for the Eastern District of Missouri, Eastern Division, are reported at 373 Federal Supplement 1128 and are printed here at Pages A 1, A 3 and Pages A 28, A 31.

The Opinion of the Eighth Circuit Court of Appeals is found at 507 Federal Reporter 2d 980 and printed here in the Appendix at Pages A 11-A 24, and the Judgment of that Court is found in the Appendix at Page A 9.

JURISDICTION

The Judgment of the Eighth Circuit Court of Appeals was entered on December 17, 1974, and is printed in the Appendix at Pages A 9-A 24. The Order denying a Rehearing was issued on January 24, 1975, and is printed in the Appendix herein at Page A 25. The Order denying the motion to vacate the order denying rehearing and to reinstate Petition for Rehearing was issued on February 12, 1975, and is printed at Page A 26. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the Judgment of the Trial Court dismissing petitioners' case because the pleading of the petitioners established that the petitioners had a right, secured by the Federal Constitution and laws, to a statement of the reasons for their termination and a hearing on those charges.

2. Whether the Court of Appeals erred in affirming the judgment of the Trial Court because petitioners having been reappointed after their maximum probationary period had a Constitutionally protected expectancy to continued employment giving respondent the discretion to terminate only for good and sufficient cause.

3. Whether the Court of Appeals erred in distinguishing the case of *Perry v. Sindermann*, 408 U.S. 593 (1972), and in not bringing its decision in harmony with decisions from other Circuits.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and regulations,

1. Fourteenth Amendment to the United States Constitution:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

2. 42 U.S.C., Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceedings for redress."

3. Acadamic Tenure Regulations, University of Missouri, as Established March 10, 1950, by the Board of Curators (hereinafter referred to as the Regulations). The complete text of the Regulations is given in Appendix H at page A 34, the provisions directly involved are the following:

Sec. 2. Types of appointments.

A. There shall be two types of appointments to academic staff positions, term appointments and continuous appointments.

B. Term appointments begin at a specified date and terminate at a specified date. Term appointments usually are for a period of one academic year, but may be for a longer or shorter period.

C. Continuous appointments begin at a specified date but have no specified date of termination.

D. Appointments to regular academic staff positions may be either term appointments or continuous appointments, subject to the limitation stated in Sections 4 and 5 as to the maximum number of years of service under term appointments.

Sec. 3. Tenure.

A. Holders of academic staff positions under continuous appointments shall have permanent or continuous tenure, subject to termination only for cause, for retirement for age in accordance with Board retirement regulations, or under extraordinary circumstances because of financial exigencies. Due consideration shall be given to seniority in terms of academic rank and length of service in the event certain continuous appointments must be terminated because of financial exigencies.

STATEMENT OF THE CASE

This suit was brought in the United States District Court for the Eastern District of Missouri, Eastern Division, by petitioners Cusumano and Harmon against the respondents, who were administrative officers and members of the Board of Curators of the University of Missouri. Jurisdiction was based on the Fourteenth Amendment to the United States Constitution and on Title 28 U.S.C., Sections 1331, 1343 and 2201 and Title 42 U.S.C. Section 1983.

The University of Missouri by its Board of Curators established Academic Tenure Regulations (hereinafter called "Regulations") on March 10, 1950, which govern its contractual relationship with academic staff members. These Regulations are appended hereafter as Appendix H. at Page A 34. These Regulations remained in full force and effect and were a part of the contract under which petitioners worked for the University of Missouri until they were terminated. The respondents adopted a Statement of Principles concerning academic freedom and tenure and attached said statement to the academic tenure regulations referred to hereinabove. This Statement of Principles was promulgated and endorsed by the Association of American Colleges, the Association of University Professors and various other academic associations (A 54).

The maximum probationary period for petitioner Harmon, because of his appointment and his prior experience was 3 years of employment. Petitioner Cusumano's appointment called for a 7 year maximum probationary period. During the period of their employment petitioners each received one year term appointments; Harmon's third such appointment and Cusumano's seventh appointment were given to them in the spring of 1970 for the school year 1970-1971.

During the school year 1970-1971, Harmon in late December of 1970, Cusumano in late March, 1971, the petitioners

were notified by the respondents that they were going to be given a one year term appointment for the following year and at the end of that appointment they would be terminated. They were given no reason whatever for the termination. To their inquiry concerning the reason for their termination the petitioners were told that no reasons were necessary since they had no tenure under the existing Regulations. Petitioner Harmon had many years of teaching and research experience at the university level prior to accepting appointment at the University of Missouri. Petitioner Cusumano had been voted the outstanding teacher in his department four times during the seven years of his employment. They were told of no inadequacy in their performance. (Petitioners' First Amended Complaint Count I, para. 14, 15, 16, 17, 25; Count II, para. 12, 19.)

Petitioners fruitlessly sought the cause of their termination through the administrative channels of the University and then brought a complaint to the Eastern District of Missouri, U.S. District Court against the respondents. This complaint was dismissed on the fourth day of October, 1972, and the Memorandum and Order of Dismissal is appended hereto as Appendix F. The dismissal was predicated on the promise of the University that an administrative hearing would be held, making the petitioners' complaint premature. A hearing was held thereafter but it was not a substantive hearing as to the cause of termination but a hearing to determine whether or not the petitioners had been given timely notice of termination. And it was decided that they had.

The petitioners alleged that the policy and practice of the University had been to give a continuous appointment contract or "tenure" to all teachers at the end of the maximum probationary period and this allegation has remained unchallenged by the respondents. (Count I, paragraph 19 and Count II, paragraph 15 of First Amended Complaint.)

The petitioners were each given one year appointments beyond their maximum probationary period and were told that they would not be rehired thereafter.

Neither of the petitioners has been able to secure employment in an academic institution since their termination from the University of Missouri.

All of the above facts are undisputed and uncontradicted by Respondents' Motion to Dismiss which was granted.

REASONS FOR GRANTING THE WRIT

The question squarely presented in this writ is: When University professors have completed their maximum probationary period as set forth in the Regulations of the University, by whom they are employed, can they be terminated without being given the reasons for their termination and a hearing on the charges?

In the opinion of the Eighth Circuit Court of Appeals the only way that a teacher can acquire a protectable interest in his job in a State or public university which has rules and regulations for tenure is to have acquired "tenure" (or to have received a contract of continuous appointment) (A 22). Such an interpretation gives the University a right to breach any of its rules concerning the length of teacher probation with impunity. This interpretation flies in the face of this Courts' pronouncements in *Perry v. Sindermann*, 408 U. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The contract between the respondents and petitioners embodies the rules and regulations adopted by the respondents (Appendix H) and the petitioners had a right to rely on its provisions. Petitioners have been unable to find a fact situation similar to their own but the principles which govern their relationship with respondent have been discussed in numerous opinions. The theoretical underpinnings of this relationship have been set forth in the Supreme Court decisions *Perry v. Sindermann*, supra, and *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Other Circuits have recognized that there must be a balancing of competing interests in any decision concerning the State's interest as employer versus the individual's interest. (Pred v. Board of Public Instruction of Dade County, Fla., 415 F. 2d 851 (5th Cir. 1969), *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970), Cert. Denied, 402 U. S. 972).

The crucial issue which petitioners pray this Court to review is when a state university adopts principles of academic freedom

and tenure promulgated by many educational organizations and uses these principles as an inducement to teachers to accept employment at its institution, can it ignore those principles in its dealings with its employees (Appendix H)? As with most universities which adopted the Principles of Academic Freedom and Tenure under pressure from the various educational associations endorsing the principles, the University of Missouri formed its Regulations from the Principles. They recognize only two types of appointments, term appointments before the expiration of the probationary period, and continuous appointments for tenure after the expiration of such period (4 and A 36). After the end of the probationary period, termination must be for just and sufficient cause.

The Court of Appeals has stated that the "Statement of Principles" adopted by the respondents are only guidelines which can be varied at the pleasure of the university (A 23). The Statement of Principles states:

Academic Tenure

> (a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

and further:

> (a)(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of high education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a proba-

> tionary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notices should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.

The university adopts the length of probation and the notice principle in the body of the Regulations (A 34).

Any teacher appointed to the regular academic staff of the University of Missouri had an absolute right to rely on the fact if he were not notified to the contrary at least one year prior to the end of his maximum probationary period as set forth, he would be continued in service under a continuous employment contract.

Both petitioners reached the penultimate year of their maximum probationary periods in the school year 1969-1970. Both finished their teaching duties and began preparing for the following year without notice that they would not be retained with a continuous employment contract. Having fulfilled their contractual obligations to that date, they had a right to rely on the respondents to fulfill their contractual obligations and that right amounts to a property right: the expectancy of re-employment that is fully explained in the *Roth* and *Sindermann* cases, supra. The advantages to the University and the detriments to the teacher of ignoring this principle are crystal clear. The University of course would prefer never to commit itself to a long term contract but would prefer to reexamine each teacher each year. The detriment to the teacher is obvious in this case. The notice which petitioners received in the winter and spring of the 1970-1971 school year was so late as to prohibit them from finding alternative teaching employment during the 1970-1971 school year. Petitioners were forced then to accept the offer from the University of Missouri at Rolla. The University thus, in actuality,

received two years service from veteran teachers on a temporary appointment basis, without granting the rightful tenure benefits to teachers of such experience. The loss of the summer and fall of 1970 to seek new employment caused incalculable damage to the petitioners, since neither of the petitioners were able to secure employment after beginning their search in the winter and spring of 1971.

It is undisputed that in the past, the practice of the university was to give a contract for continuous employment at the end of a teacher's probationary period (Petitioners' First Amended Complaint. Count I paragraph 15 and Count II paragraph 19). Added to this practice the Statement of Principles adopted in the body of the University Regulations, it is clearly shown that the petitioners have more than a "mere expectancy of employment" that this court eschewed in *Roth*, supra.

District Court Judge Samuel P. King stated petitioners' position eloquently in *Stephen M. Francis v. Charles S. Ota et al.*, 356 F. Supp 1029 (DCD. Hawaii 1973) at page 1033:

> In the developing area of the law dealing with academic due process, it is clear that a non-tenured faculty member must have more than a subjective expectation of future employment in order to assert a property interest protected by the Fourteenth Amendment. Board of Regents v. Roth, *supra*. However, even where a contract obligation might not otherwise exist, the college can create one if it adopts regulations or standards which lead to the expectation of reemployment. Greene v. Howard University, 134 U.S.App. D.C. 81, 412 F. 2d 1128 (1969); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). The Supreme Court amlified this principle in *Roth, supra*: "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitle-

> ment to those benefits." 408 U.S. 577, 92 S.Ct. 2709. In Perry v. Sindermann, *supra*, decided the same day *Roth*, the Court quoted with approval from Corbin on Contracts to the effect that "[e]xplicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' " It held that the teacher "must be given an opportunity to prove the legitimacy of his claim of such entitlement [to continued employment] in light of 'the policies and practices of the institution.' "

The petitioners have presented a bona fide constitutional claim upon which there has been no hearing in the lower courts. In a parallel situation this court held, in *Perry v. Sindermann*, supra, that the grant of Summary Judgment against the complainants, without full exploration of the issue, was improper. Mr. Justice Stewart wrote in *Perry v. Sindermann*, supra at page 602,

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts —that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17-28.

The Eighth Circuit Court of Appeals has refused to recognize the principle of contractual obligations between the uni-

versity and the non-tenured teacher discussed in the First Circuit in *Green v. Howard University*, supra and *Francis v. Ota*, supra. The objective expectancy of re-employment can only be defeated by a due process method including notice of the reasons or charges against the teacher, and a hearing at which the teacher may defend his position and good name.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and order of the Court of Appeals for the Eighth Circuit.

Respectfully submitted

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Certificate of Service

Three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed this 12th day of May, 1975, postage prepaid to Messrs. Jackson A. Wright, Marvin E. Wright, James S. Newberry & Richard S. Paden, 227 University Hall, Columbia, Missouri 65201, and Mr. Robert Neill, Jr., 705 Olive Street, St. Louis, Missouri 63101.

Sidney M. Harmon